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No. 86-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHEMICAL MANUFACTURERS ASSOCIATION,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

BRIEF OF AMICUS CURIAE LEATHER INDUSTRIES OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the Court of Appeals lacked jurisdiction under section 509(b)(1) of the Clean Water Act to review the adequacy of sludge management regulations under section 405 of the Clean Water Act.
2. Whether the underlying action challenging EPA's removal credit regulations based upon the absence of comprehensive sludge management regulations under section 405 was timely.
3. Whether EPA may allow removal credits under section 307(b)(1) without first promulgating comprehensive sludge management regulations under section 405.

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INTRODUCTION AND STATEMENT OF INTERESTS

Leather Industries of America ("LIA") respectfully submits this brief as *amicus curiae* in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit (hereinafter cited as "CMA Pet.") filed by the Chemical Manufacturers Association ("CMA") on August 16, 1986.

LIA, formerly the Tanners' Council of America, is one of the oldest trade associations in America. Its members are tanners of leather and manufacturers of leather goods, and it represents the substantial majority of leather tanners and finishers in the United

States. Many of LIA's member companies are indirect dischargers for whom categorical pretreatment standards promulgated by the Environmental Protection Agency ("EPA") on November 23, 1982, went into effect on November 23, 1985. *See* 47 Fed. Reg. 52,848.

In reliance upon EPA's removal credit regulations promulgated in 1978 and amended in 1981 and 1984, many of these companies have applied for or received removal credits from Publicly Owned Treatment Works ("POTWs") into which they discharge. These removal credits have allowed LIA member companies to avoid the unnecessary expense of construction and operating pretreatment technology which merely duplicates the treatment of the POTW.

The opinion of the Court of Appeals for the Third Circuit ("Court of Appeals" or "Third Circuit") invalidates the EPA regulatory program under which these removal credits were issued and therefore voids the credits upon which the companies have reasonably relied. Upon issuance of the Court of Appeals mandate, those companies will be in violation of the Clean Water Act and subject to potential civil penalties. Because its members have a direct stake in the outcome of this proceeding, LIA hereby files its brief in support of the petition for writ of certiorari filed by the CMA.[1]

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[1] LIA also supports the Petition filed by the Chicago Association of Commerce and Industry, et al., No. 86-608. That petition urges review of the Third Circuit's ruling on certain technical deficiencies of the regulations as well as the absence of sludge regulations. The focus of this brief, however, is upon the perceived jurisdictional inadequacy of that portion of the Third Circuit's ruling which invalidated the 1984 pretreatment regulations pertaining to removal credits on grounds that EPA's

EPA acknowledges that industries have reasonably relied upon removal credits. EPA Brief in Opposition at 9 (hereinafter cited as "EPA Br. Opp."). EPA also agrees that invalidation of those credits by the Court of Appeals on the erroneous ground that EPA's sludge regulations are inadequate is incorrect. *Id.* However, EPA has declined to urge review of the decision below because it believes that the harm will be cured by promulgation of EPA's sludge regulations.

EPA's sludge management regulations were already overdue when the first removal credits regulations were promulgated in 1978. Since that time, EPA has consistently promised that its regulations are "close to proposal." *See* CMA Pet. at A-49. In its Brief in Opposition, EPA again acknowledges that the rulemaking schedule has been delayed. EPA Br. Opp. at 10. Even if EPA adheres to its newly proposed schedule, LIA members will face irreparable harm as a consequence of the opinion of the Court of Appeals invalidating removal credits. Loss of removal credits will force companies to spend thousands of dollars individually to construct treatment equipment which will become unnecessary when removal credits are reissued. It is facile at best for EPA to claim that this ruling by the Court of Appeals invalidating removal credits based upon the absence of section 405 regulations and subjecting companies to potential irreparable harm is not worthy of correction by this Court.

LIA believes that review by this Court is essential to correct the errors in the opinion below and to avoid

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underlying sludge management regulations under section 405 (33 U.S.C. § 1345) (hereinafter referred to as "section 405") are inadequate.

the adverse effects which improper revocation of removal credits would have upon LIA members. This case raises significant issues of the jurisdiction of the courts to oversee an agency's administration of the law. Settled administrative decisions upon which regulated parties have extensively relied should not be subject to constant and continuing review by the courts. The Clean Water Act explicitly so provides by limiting the cases which may be heard directly by courts of appeals and by requiring such suits to be brought within 90 days. *See* 33 U.S.C. § 1369(b)(1)(1982).

STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

LIA members, together with municipalities, have invested substantial resources in compliance with the pretreatment regulations promulgated by EPA under the Clean Water Act. As intended by Congress, those investments have served to protect and conserve the Nation's water supplies. As part of this regulatory scheme, LIA members, and others, have been able to avoid investment in certain technologies and equipment that merely duplicates the wastewater treatment of POTWs. The substantial investment decisions necessitated by EPA's pretreatment regulations must be made well in advance of compliance deadlines in order to avoid costly civil penalties.

If EPA's pretreatment regulations are to require important investment decisions on the part of industry and government, it is essential to fairness that those making the investment decisions be entitled to rely on the finality of the rulemaking on which those decisions are based. In this case, Respondent Natural Resources Defense Council's ("NRDC's") challenge to

EPA's rulemaking was untimely and should be jurisdictionally barred. NRDC initiated its challenge to the rulemaking several years after promulgation of the standard, in clear contravention of the Clean Water Act's requirements that such challenges be initiated within 90 days of promulgation. *See* 33 U.S.C. § 1369(b)(1) (1982). Because NRDC failed to initiate this action in a timely fashion, its lawsuit should have been dismissed by the Court of Appeals. In addition, the Court of Appeals lacked original jurisdiction to address the validity of EPA's sludge management regulations.

Finally, the Court of Appeals erred by invalidating the pretreatment removal credits provisions of the standard because EPA had not promulgated a "comprehensive framework" of sludge disposal regulations. We agree with the CMA that neither the statute nor its legislative history provides any requirement for prior issuance of sludge disposal regulations. Rather, the statute merely, but explicitly, provides that removal credits can be approved so long as the resulting discharge "does not prevent" the POTW from complying with sludge use or disposal practices in accordance with section 405 of the Clean Water Act. 33 U.S.C. § 1317(b)(1)(1982). The conclusion of the Third Circuit Court below that this language presupposes the comprehensive and final issuance of sludge disposal regulations is totally unsupportable and should be vacated.

REASON FOR GRANTING THE WRIT

The Writ Should Issue To Avoid Conflicts With Decisions Of This Court And Other Courts Of Appeals Regarding Original Appellate Court Jurisdiction Under The Clean Water Act

I. The Third Circuit Exceeded Jurisdiction Limitations Required by the Clean Water Act and Accepted By Other Courts of Appeals in Holding EPA's Removal Credit Regulation Invalid Because of the Absence of Sludge Management Regulations

Courts of appeals are courts of limited jurisdiction. *See Bender v. Williamsport Area School Dist.*, 106 S.Ct. 1326, 1331 (1986). In cases challenging Agency action under the Clean Water Act, original court of appeals jurisdiction is available only for certain limited categories of cases. *See* 33 U.S.C. § 1369(b)(1) (1982). In addition, challenges under section 509 must be brought within ninety days of promulgation of the challenged action. *Id.* In this case, the challenge to removal credits based upon the absence of adequate sludge management regulations under section 405 violates both of these jurisdictional precepts.

A. The Court of Appeals lacked original jurisdiction to review the validity of EPA's regulation of sludge management and disposal

Section 509(b)(1) of the Clean Water Act provides for original court of appeals jurisdiction only over limited EPA actions.[2] These are Agency actions un-

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[2] Section 509(b)(1) reads: "Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard un-

dertaken upon well-developed administrative records, for which direct review by courts of appeals is particularly appropriate. *See E.I. duPont de Nemours & Company v. Train*, 430 U.S. 112 (1977). Other circuit courts have held that Agency actions not falling within the scope of these specifically enumerated categories of section 509(b)(1) are not reviewable by courts of appeals. *City of Baton Rouge v. EPA*, 620 F.2d 478, 480 (5th Cir. 1980); *Bethlehem Steel Co. v. EPA*, 538 F.2d 513, 518 (2d Cir. 1976). Review of section 405 regulations is not among the enumerated categories of action subject to direct review by courts of appeals.[3]

In this case, the Third Circuit directly reviewed the adequacy of EPA's section 405 sludge management regulations. It held that EPA's existing sludge regulations are inadequate because they "do nothing to advance the congressional goal of making sludge into a productive asset rather than a toxic liability." *NRDC v. Thomas*, 790 F.2d 289, 314 (3d Cir. 1986). The Court of Appeals also ruled that EPA could not rely

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der section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal Judicial District in which such person resides or transacts such business upon application by such person." 33 U.S.C. § 1369(b)(1) (1982).

[3] Under section 505 of the Clean Water Act, district courts are granted express jurisdiction to review actions predicated upon the performance of certain non-discretionary duties. 33 U.S.C. § 1365(a) (1982). General jurisdiction for district court review also exists under 28 U.S.C. § 1331 (1982).

upon regulations promulgated under other environmental statutes, despite the fact that such regulations establish sludge management restrictions, albeit not under section 405. *Id.* In so holding, the Court of Appeals had before it no administrative record supporting either the existing section 405 regulations or the scope and applicability of other regulations affecting sludge disposal.[4]

Although the Court of Appeals may have had direct jurisdiction pursuant to section 509 to review removal credit regulations promulgated under section 307, the Court of Appeals clearly lacked jurisdiction to review the adequacy of section 405 regulations. Section 307 only requires that removal credits not prevent "sludge use or disposal by such works in accordance with [section 405 of this Act]." 33 U.S.C. § 1317(b)(1)(1982). This provision does not afford the Court of Appeals jurisdiction to review the validity of existing section 405 regulations. Rather, it only affords the court authority to compare removal credit regulations under section 307 with existing section 405 regulations to assure that removal credits do not "prevent" compliance with promulgated sludge management requirements.

B. The Court of Appeals lacked jurisdiction because NRDC's time to challenge the removal credits based upon the absence of section 405 regulations had expired.

Section 509(b) of the Clean Water Act provides that a regulation otherwise subject to review in the court

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[4] LIA also joins CMA's argument that the ruling of the Third Circuit failed to accord sufficient deference to a reasonable Agency interpretation of its own regulations. CMA Pet. at 17-21.

of appeals may only be challenged by a Petition for Review filed within ninety (90) days of promulgation unless the challenge is based solely on grounds which arose after the ninety day period expired. 33 U.S.C. § 1369(b)(1). This time limit is jurisdictional and is premised upon the same important policy considerations which underlie other filing and timeliness limitations, namely administrative repose. *See NRDC v. EPA*, 673 F.2d 400, 406 (D.C. Cir.), *cert. denied*, 459 U.S. 879 (1982); *Homestake Mining Co. v. EPA*, 584 F.2d 862, 863 (8th Cir. 1978). *See also Texas v. ICC*, 749 F.2d 1144, 1146 (5th Cir.), *cert. denied*, 105 S. Ct. 3513 (1985) (enforcing similar sixty (60) day review provision for Interstate Commerce Commission rulings); *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905, 911 (D. C. Cir. 1985) (construing ninety (90) day review provision of the Comprehensive Environmental Response Compensation and Liability Act); *City of Seabrook v. EPA*, 659 F.2d 1349, 1370 (5th Cir. 1981), *cert. denied*, 459 U.S. 822 (1982) (strictly enforcing similar sixty (60) day judicial review provision in Clean Air Act). Parties must be able to rely upon the finality of Agency rulemaking since important investment decisions must be made well in advance of compliance dates to avoid substantial civil penalties. Moreover, these time limitations impart finality to the administrative process, thus conserving administrative resources. *Texas Municipal Power Agency v. EPA*, 799 F.2d 173, 175 (5th Cir. 1986); *NRDC v. NRC*, 666 F.2d 595, 602 (D. C. Cir. 1981). Regulatory provisions which remain unchallenged during the ninety day period must not be subject to future challenge absent a showing of significant new facts or circumstances. *Eagle-Picher Industries*, 759

F.2d at 911; *Investment Company Institute v. Board of Governors*, 551 F.2d 1270, 1280 (D.C. Cir. 1977).

1. NRDC's Challenge Was Not Brought Within 90 Days.

For the leather tanners, decisions regarding the installation of water pollution control technology ripened in November of 1982 when EPA promulgated effluent guidelines for the industrial category, including pretreatment standards for existing sources ("PSES") and pretreatment standards for new sources ("PSNS") for indirect dischargers. In effect at that time, although under challenge as too stringent, were EPA's 1981 removal credit regulations. Those regulations, including provisions allowing for the approval of removal credits prior to promulgation of comprehensive sludge management regulations under section 405 of the Clean Water Act, were upheld by the Court of Appeals for the Third Circuit without a challenge by NRDC to the absence of section 405 regulations. NRDC was a party to that litigation. *National Association of Metal Finishers v. EPA*, 719 F.2d 624, 646 (3d Cir. 1983), *rev'd in part sub nom. Chemical Manufacturers Association v. NRDC*, 470 U.S. 116 (1985).

When NRDC raised its challenge in 1984, EPA's rulemaking on the relationship between removal credits and section 405 regulations was already well settled. In fact, the relationship between removal credits issued under section 307(b)(1) and sludge use guidelines issued under section 405 of the Clean Water Act has remained virtually intact since 1978. Neither the 1981 nor the 1978 regulations required development of final comprehensive sludge management regula-

tions under section 405 as a precondition for program authorization for removal credits by POTW.

In its preamble to the 1978 regulations EPA announced:

> Where Section 405 criteria are not yet available, applicable EPA and State guidance will be used and the municipal NPDES permit will condition continuation of the allowances for POTW removal upon compliance with Section 405 criteria whenever it is published.

43 Fed. Reg. 27,736, 27,765 (June 26, 1978). The applicable EPA and State guidance to be used pending publication of section 405 regulations included regulations issued under the authority of the Clean Air Act, the Toxic Substances Control Act ("TSCA"), existing ocean dumping regulations, subtitle C of the Solid Waste Disposal Act, and State criteria. Clearly, the parties were on notice in 1978 that EPA did not consider comprehensive regulations under section 405 of the Clean Water Act as a condition precedent to the issuance of valid removal credits. NRDC did not challenge this interpretation.

In its 1981 regulations, EPA repeated its view that while approval of removal credits by a POTW requires compliance by the POTW with applicable State and Federal sludge management requirements, authorization to grant removal credits does not require prior promulgation of special rules embracing all such standards under section 405 of the Clean Water Act:

> [T]he POTW first determines the manner in which it will dispose of its sludge, then it identifies and complies with the appropriate Federal regulations or guidelines pertaining

> to that method of disposal. Section 403.7 provides that the POTW will not be able to receive removal allowance approval [Section 403.7(b)(4)] or maintain an approved level of removal [Section 403.7(f)(2)] if it fails to comply with Federal, State or local requirements applicable to its selected method of sludge disposal.

46 Fed. Reg. 9404, 9427 (January 28, 1981). Again, EPA suggested that such approval could be based upon a variety of applicable Federal regulations or guidelines relating to sewage sludge disposal, including the Clean Air Act, TSCA, and the Resource Conservation and Recovery Act, as well as the Clean Water Act. *Id.* at 9428. No requirement for comprehensive section 405 regulations was set forth.

Thus, the grounds which the Court of Appeals asserts as its basis for overturning EPA's 1984 regulations were clearly enunciated not once but twice prior to 1984. EPA's reliance upon this "patchwork" of regulatory authority rather than comprehensive section 405 regulations was manifest in both 1978 and 1981. Interested parties, including NRDC, had the opportunity to challenge this interpretation not once but twice and failed to do so.

This portion of the regulations which is virtually unchanged from previous rules should not be considered "fair game" for attack long after critical investment decisions have been implemented. Otherwise, EPA could never adjust, fine-tune or amend regulations without subjecting its entire rule to endless review. *Pacific Legal Foundation v. Costle*, 586 F.2d 650, 655 (9th Cir. 1978), *rev'd on other grounds*, 445 U.S. 198 (1980) (modification of existing permit af-

fects only the meaning and scope of those provisions and does not afford a basis for judicial review of all provisions of the permit). Companies which have reasonably relied upon the finality of such regulations should not later be forced to bear unnecessary burdens, including additional compliance costs and the threats of civil penalties, when such regulations are belatedly attacked.

2. No new grounds have arisen to allow review.

The Third Circuit held that NRDC's claim is based upon "grounds" which arose after the 90th day following promulgation of earlier removal credit rules. *NRDC v. Thomas*, 790 F.2d at 312-13. These "grounds" actually consist only of EPA's continuing failure to promulgate section 405 regulations. However, as the Court of Appeals acknowledges, the section 405 regulations which it finds critical to approval of any removal credits were already overdue in 1978 and in 1981 when prior versions of the regulations were promulgated. *Id.* Nothing but the passage of time and the subjective expectations of NRDC have changed since then. Neither of these considerations can justify an extension of a jurisdictional filing requirement.

New "grounds" ordinarily must include events which "occur or information [which] becomes available after the statutory review period expires that essentially create a challenge *that did not previously exist.*" *Eagle-Picher Industries*, 759 F.2d at 913 (emphasis added); *Geller v. FCC*, 610 F.2d 973, 977-78 (D.C. Cir. 1979). Here the grounds for NRDC's challenge existed in 1978 and 1981. Accordingly, NRDC's challenge to the 1984 rules is time barred, and the Court of Appeals lacked jurisdiction to hear that claim. This

requirement is intended to ensure finality of administrative decisions upon which regulated parties must make financial and other business actions. The repose of established regulations is central to the fairness of our administrative process. The Third Circuit's ruling in this case, in contravention of this well-established rule, has caused imminent irreparable harm to LIA members. This harm can only be prevented by the granting of the petition.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit filed by the Chemical Manufacturers Association should be granted.

Respectfully submitted,

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